Strand Electric & Engineering Co. Ltd. v. *Brisford Entertainments Ltd.*,[12] Denning L.J. said: —

"The rule .... is that a wrongdoer, who keeps the owner out of his land, must pay a fair rental value for it, even though the owner would not have been able to use it himself or to let it to anyone else. So also a wrongdoer who uses land for his own purposes without the owner's consent, as, for instance, for a fair ground, or as a wayleave, must pay a reasonable hire for it, even though he has done no damage to the land at all."

The plaintiff however has not produced any relevant factors as a basis to enable this court to assess the damages. In the circumstances, this calls for a common sense approach to the matter guided by the principles stated above. Having seen the land myself together with the parties and their counsel, I assess general damages at $15,000 inclusive of the diminution of the value to the plaintiff's land as a result of the construction of the access road and the reasonable hire for the use thereof by the defendant for the period January 1964 to June 1969.

Judgment for the plaintiff.

Solicitors: *Dato' S. M. Yong & Co.; Shearn, Delamore & Co.*

PUBLIC PROSECUTOR v. ALING BIN AYUN

[O.Cr.J. (Lee Hun Hoe J.) May 8, 1970]

[Kota Kinabalu — Criminal Trial No. 14 of 1961]

Criminal Law and Procedure — Evidence of statements in identification parades — Admissibility under Sabah Criminal Procedure Code, 1959.

In this case the accused was charged with the offence of rape. The main question at issue in the case was the question of identity of the person who was alleged to have raped the complainant. The only evidence of identity was that the complainant identified the person whom she alleged to have raped her to be the accused at the identification parades.

Held: (1) as there is no provision in the Sabah Criminal Procedure Code similar to section 113 of the F.M.S. Criminal Procedure Code, or section 124 of the S.S. Criminal Procedure Code, the general rules of evidence as to the admissibility and relevance apply and there is nothing to prevent the admissibility of statements made to a police officer in the course of investigation except if such statement amounts to a confession;

(2) in the instant case the police had acted fairly in conducting the identification parades and the evidence of identification was admissible.

Cases referred to:-

(1) *Pawanteh & Ors.* v. *Public Prosecutor* [1961] M.L.J. 214, 216.

(2) *Nagalingam* v. *Public Prosecutor* [1957] M.L.J. 196.

(3) *Lee Lian & Ors.* v. *Public Prosecutor* [1956] M.L.J. 191.

(4) *Chapman* v. *R.* (1911) 7 Cr. App. R. 53, 55 & 56.

(5) *Chang Kim Siong* v. *Public Prosecutor* [1968] 1 M.L.J. 36.

CRIMINAL TRIAL.

Stephen Foo for the Public Prosecutor.

Accused in person.

Lee Hun Hoe J.: Accused is charged with the offence of rape contrary to section 376 of the Penal Code.

The case for the prosecution may be summarised. On June 28, 1969 at about 3 p.m. Saribut, Majid and the accused left Majid's house at Mile 6½, Bak Bak, Kudat, to go to Kampong Tajau. Saribut and accused were each pushing a bicycle. They went by way of the beach. At Mile 8 they saw a woman, the complainant in this case, collecting firewood some 10 chains away near the bush. Shortly after they passed the complainant the accused said he wanted to go back. It was then 4.10 p.m. The accused left them on his bicycle. Meanwhile the complainant was tying the firewood she collected into bundles. As she was doing this a man grabbed her from behind and overpowered her. He threatened her with a chopper. Subsequently he had sexual intercourse with her. After he ran away the complainant also ran towards her house which is about half a mile away. That same evening she lodged a report at the police station, Kudat and was later sent to the hospital for medical examination. On July 3, 1969 the accused was arrested. That afternoon an identification parade was arranged. The complainant identified the accused on two separate identification parades as the person who had raped her.

The accused was not represented. He denied he was at the scene of crime on the day the rape took place. His story was that on June 28, 1969 at 7 a.m. he went out to work at Mile 14, Sequati. He finished work at 12 noon. He then went to town to buy some provisions which he took home. He went back to work at 1.15 p.m. and returned home at 9 p.m. After that he remained at home.

The complainant stated that while she was tying a second bundle of firewood a person approached her from behind and grabbed her neck and then snatched away her chopper. This was said to happen 10 minutes after she saw three persons passing by. Both Saribut and Majid gave evidence to the effect that they and the accused walked past complainant some 10 chains away. Shortly after the accused left them on his bicycle. She said that the man then cut loose her trousers belt with the chopper and threatened to kill her with it if she did not obey him. He spoke in Malay which she understood. She was frightened. She struggled to get free but could not. At that time she was four months pregnant. After her trousers dropped down he dragged her to a spot some 6 feet away. He then pushed her down and untied his own trousers and got on top of her. Sexual intercourse followed. After putting on his trousers he ran away. Without even putting on her trousers she got up and ran away towards her house about half a mile away crying and shouting. Her brother-in-law and uncle come out and she told them what happened. Later that day her aunt took her to the police station and lodged a report.

Police constable Chang Piang Min was at the barrack at the time and was instructed to proceed to the police station where he took the report of the complainant. In substance the report relates what happened on that day.

The accused cross-examined the complainant about the shirt and trousers of the man. She said he did not wear his shirt but had it wrapped round his neck and the shirt had red and white stripes. As for the trousers her reply was that he wore a white shorts. Both Saribut and Majid confirmed that on that day accused wore a shirt with red and white stripes.

Rasiah binte Musa, the accused's mother gave evidence that on June 28, 1969, a Saturday, the accused went out early in the morning to work. The accused told her he was going to work in a ship. He came back at 11 a.m. for lunch. After lunch he left for work again. He did not come back until about 9 p.m. After that he went to bed.

Koh Kok Yin, a contractor said he employed the accused on a temporary basis. He contracted to accused the work of carrying cement. On June 27, 1969 the accused was carrying cement but completed only half the work. On June 28, 1969 the accused came in the morning and collected $75 from him. After that he did not come back to work that day.

Dr. Lewsey examined the complainant shortly after she had made a report to the police. He found bruises on her left eye, faint bruises on the insides of both thighs and bruising of the vulva. He found the presence of spermatozoa in the vagina. He found that she was four months pregnant. In his opinion sexual intercourse had taken place within the last few hours prior to his examination. He was also of the opinion that the bruises, particularly those on the thighs and vulva could only be consistent with refusal to have intercourse with another. On July 3, 1969 he also examined the accused but found no mark on him.

Inspector Lee Kong Thau went to the scene of crime with the complainant after she came back from the hospital. By then it was dark. With the help of torches he found a pair of trousers, a pair of slippers, a hat and a chopper. All these belong to the complainant. He also made a sketch of the scene.

The complainant appears to me to be a simple country woman and a witness of truth. I also observe that she has a good retentive memory. I have no reason to disbelieve her story. Both Saribut and Majid are young men and about the same age as the accused. I also have no reason to disbelieve them when they said accused was with them that day. The accused cross-examined most of the prosecution witnesses to test their memories. I may say that they came out well.

I would like to say at once that I have no doubt at all that the complainant was raped within the meaning of section 375 of the Penal Code. The man threatened to kill her with the chopper. I have also no doubt that she was put in fear of her life. It was through this fear that she gave herself to the assailant. I am satisfied she did not consent to the intercourse.

The vital element in this case is the identity of the culprit. The only evidence of identity is that she identified the person whom she alleged to have raped her to be the accused at the identification parades.

Inspector Lee arranged for the parade. The complainant was taken to a room in the police station where Inspector Lee remained with her. When everything was ready police constable Aluda escorted her to the compound where eleven persons including the accused was lined up. Inspector Lee said the ten persons were people working at the wharf and their ages ranged from 20 to 25 years but some may be younger. A.S.P. Nawab Khan was in charge of the identification parade. He said their ages ranged from 16 to 20 years and their heights 5'2" to 5'7". All the eleven persons were Bajaus.

A.S.P. Nawab Khan in his evidence said: —

"After all was ready I instructed P.C. Aluda to escort witness to the parade. When she came I explained to her that it was for her to identify the person who had raped her. I spoke to her in the presence of accused. Then I asked her to identify the person she alleged to have raped her. I walked together with her. She put her hand on the right shoulder of accused."

The accused was then standing at position No. 5 from left. After she had identified the accused she was escorted back to the room where inspector Lee was. A.S.P. Khan then asked the accused if he wished to change position and dress. The accused took off his shirt and put on sun glasses and stood at position No. 1 from left. The other ten persons also took off their shirts and put on sun glasses. Again police constable Aluda escorted the complainant from the room to the compound. I may say that from the room she was in she could not see what was going on around her. A.S.P. Khan again asked her to point out the person whom she alleged to have raped her. She straightaway went towards accused and put her hand on the accused's right shoulder.

The whole case hinges on the question of the identity of the person who raped the complainant. The accused was not represented. I invited the learned deputy public prosecutor to address the court on the question of admissibility of evidence arising out of the identification parades.

In *Pawanteh & Ors.* v. *Public Prosecutor*[1] Rigby J. (as he then was) held that evidence regarding identification parades was inadmissible in view of *Nagalingam* v. *Public Prosecutor*[2]. In his judgment at page 216 he stated: —

"Again, in my view, upon the authority of the decision of the Court of Appeal in *Nagalingam & Others* v. *Public Prosecutor*[2] (approving an earlier decision of Thomson J. as he then was, in the case of *Lee Lian & Others* v. *Public Prosecutor*[3]) that complaint is well-founded. In *Nagalingam's case* the appellate court was considering the provisions of section 113 of the F.M.S. Criminal Procedure Code (section 124 of the S.S. Criminal Procedure Code) which clearly enact that no statement made by any person to a police officer in the course of a police investigation shall be admissible in evidence. The court held that for the purposes of that section actions such as the pointing out of a person by a witness at an identification parade and in answer to a direct invitation by the police officer conducting the parade to identify anyone on that parade if he could, were tantamount to a statement made by a person to a police officer in the course of investigation and was accordingly inadmissible in evidence."

However, sections 113(iii) and 124(3) of the F.M.S Criminal Procedure Code and the S.S. Criminal Procedure Code respectively were amended by the Criminal

Procedure Act 1963. The subsections as amended read: "Nothing in this section shall be deemed to apply to any statement made in the course of the identification parade or falling within sections 27 and 32(a) of the Evidence Ordinance." Section 212(3) of the Singapore Criminal Procedure Code was similarly amended by L.N. 214 of 1965. The cases I mentioned are therefore no longer law.

Both Sabah and Sarawak do not have provisions similar to section 113 and 124 of the F.M.S. Criminal Procedure Code as such provisions had long been repealed. Before 1961 Sabah had the provision of section 102(1) in the Criminal Procedure Code similar to the provision of section 113(1) of the F.M.S. Code. However the whole section 102 was repealed by section 16 of the Criminal Procedure Code (Amendment) Ordinance, 1961 (No. 26 of 1961).

In the absence of such provision the general rules of evidence as to admissibility and relevance apply. Consequently there is nothing to prevent the admissibility of a statement made to police officer in the course of investigation except if such statement amounts to a confession. Section 25 of the Evidence Ordinance provides that no confession made to a police officer shall be proved against a person accused of any offence. Where the prosecution relies on the evidence of the identification parade it must satisfy the court that such parade was fairly and properly conducted. The police must not directly or indirectly do anything which might prevent the identification from being absolutely independent. They must be most scrupulous in seeing that it is so.

In *Chapman* v. *R.*[4] the appellant was convicted of having carnal knowledge of a girl under thirteen years of age. It was held that the identification of a suspected person must be carefully conducted and that it is wrong to point out the suspected person and ask "Is that the man?". Lord Alverston C.J. in the course of delivering a short judgment of the Court of Criminal Appeal observed:

"One of the boys is taken to the tent where the prisoner was. The boy thought it was another man. Later on both the boys were taken to the guard tent, where the prisoner then was, and there was only one other man besides prisoner. The police sergeant asked 'Is that the man?' That is not a satisfactory way of identification, whether the persons identifying were young or old. It is not right to point out and ask questions in this way. The usual and proper way in such cases is to place the suspected man with a sufficient number of others, and to have the identifying person pick out a man without assistance. Although identification is difficult, this method does strengthen it."

Similarly in the Sarawak case of *Chang Kim Siong* v. *Public Prosecutor*[5] a witness was given an opportunity by the police to see the accused prior to the formal identification at the identification parade. The Federal Court held that evidence of subsequent identification at the parade by the witness was vitiated.

In the instant case the police had acted fairly and properly in conducting the identification parade. A senior police officer of considerable experience was in charge of the identification. He had acted in a most scrupulous manner to ensure that the identification was absolutely independent and that the complainant was confined in a room in the charge of an inspector.

The accused elected to give his story from the dock. He was entitled to do so. If what Saribut and Majid said were true then the accused was with them at the beach where the complainant was collecting firewood. The two of course would not know what happened after the accused left them as they were on their way to Kampong Tajau. But the accused said he was at work at Sequati that afternoon. One of the two stories must be false. The accused had no reason to lie to his mother that he was going to work in a ship. Koh Kok Yin testified that in the early morning of June 28, 1969 the accused came and collected $75 from him and did not come back to work that day. The accused only completed half the work of carrying the cement. He did not say why he suddenly decided to go to work at Sequati. Although he mentioned working with friends none of his friends was called to give evidence. I have seen and heard him. I am not impressed by the accused as I am impressed by the complainant, Saribut and Majid. I think he invented the story about working at Sequati to show that he was nowhere near the scene of the crime.

On the evidence I am satisfied beyond reasonable doubt that the accused was the person who raped the complainant. Accordingly I find the accused guilty of the offence charged.

Verdict — Guilty

CHONG FOOK KAM & ANOR. v. SHAABAN & ORS.

[F.C. Suffian Ag. L.P., Gill and Ali F.JJ.) June 5, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 31 of 1967]

Damages — Agreed damages — Whether open to appellate court to review quantum.

In this case the appellants (plaintiffs) had succeeded in the Federal Court ([1968] 2 M.L.J. 50) in their claim against the respondents for damages for false imprisonment and it was agreed that the damages be fixed at $5,000. On appeal by the respondents the Privy Council ([1969] 2 M.L.J. 219), upheld the decision of the Federal Court as regards liability though for different reasons but thought that the damages were extremely high. They therefore advised the Yang di-Pertuan Agong to remit the case to the Federal Court for it "to decide whether it is open to it to review the amount of the damages and, if so, to settle the appropriate figure in the light of their Lordships' judgment and vary its order accordingly."

Held: as the damages had been agreed, the court had no jurisdiction in the absence of agreement by the appellants (plaintiffs) to review the quantum.

Cases referred to:-

(1) *R.S. Lopes* v. *N.K.V. Valliappa Chettiar* [1968] 1 M.L.J. 225, P.C.

(2) *Norcott* v. *Norcott* (1702) 22 E.R. 236.

(3) *Ainsworth* v. *Wilding* [1896] 1 Ch. 673.

(4) *Wilding* v. *Sanderson* [1892] 2 Ch. 534.

(5) *Kinch* v. *Walcott & Ors.* [1929] A.C. 482.

FEDERAL COURT.

Ajaib Singh (Senior Federal Counsel) for the applicants.